Supreme Court, U.S.
FILED
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(2)

NO. 98-494

IN THE

# Supreme Court of the United States

October Term, 1997

**ERIEVIEW CARTAGE, INC.,**

*Petitioner,*

**v.**

**COMMONWEALTH OF PENNSYLVANIA, BOARD OF FINANCE AND REVENUE**

*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

## SUPPLEMENTAL APPENDIX

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18 pp

## SUPPLEMENTAL APPENDIX

Attached hereto as a Supplemental Appendix to the Petition for Writ of *Certiorari* of Petitioner Erieview Cartage, Inc. is *Erieview Cartage, Inc. v. Commonwealth of Pennsylvania* Unreported Memorandum Opinion and Order dated June 10, 1997. This Unreported Memorandum Opinion and Order was inadvertently omitted from Petitioner's Petition for Writ of Certiorari. Additionally, attached is *Erieview Cartage, Inc. v. Commonwealth of Pennsylvania* Reported Memorandum Opinion and Order dated February 1, 1995.

Respectfully submitted,

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**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

| | | |
|---|---|---|
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA Respondent | : | No. 437 F.R. 1992 |
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, Respondent | : | No. 438 F.R. 1992 |
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, Respondent | : | No. 439 F.R. 1992 |
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, | : | |

| | | |
|---|---|---|
| Respondent | : | No. 440 F.R. 1992 |
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, Respondent | : | No. 441 F.R. 1992 |
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, Respondent | : | No. 442 F.R. 1992 |
| | :Submitted May 9,1997 | |

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE JIM FLAHERTY, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION**
**BY PRESIDENT JUDGE COLINS**

**FILED: June 10, 1997**

Erieview Cartage, Inc. (Erieview) petitions for review of an order of the Board of Finance and

Revenue (Board) sustaining the Department of Revenue's (Revenue) assessment of corporate net income[1] (CNI) and corporate franchise[2] taxes for the years 1986 through 1988.

The stipulated facts of the case and the issues raised by the parties are identical to those we confronted in our 1995 en banc decision, Erieview Cartage, Inc. v. Commonwealth, 654 A.2d 276 (Pa. Cmwlth.), appeal quashed, 542 Pa. 677, 668 A.2d 1138 (1995) (Erieview I), involving the tax years 1983 through 1985. In that opinion we concluded that the Taxpayer was subject to the CNI and franchise taxes based on the total number of miles it logs in the Commonwealth, both pass-through miles and miles travelled in connection with a pick up or delivery in the Commonwealth.

In support of its argument that insufficient nexus exists between the Taxpayer and the Commonwealth to support taxation, the Taxpayer cites an unpublished decision in which an Illinois court found that Erieview was not subject to Illinois income tax with respect to pass-through miles. Erieview Cartage, Inc. v. Department of Revenue of the State of Illinois, No. 1-93-2565 (Ill. App. Ct., April 24, 1996). (Petitioner's Brief at Appendix B.) We note that the Illinois court's decision reached the same conclusions as this court in finding that the Taxpayer's activities constituted sufficient nexus with

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[1] Sections 401-412 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7401-7412.

[2] Sections 601-606 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§7601-7606.

the taxing state to satisfy commerce clause and due process considerations. The Illinois court found that pass-through miles were not taxable under the language of the Illinois income tax statute in question. Id. (Slip op. at pp. 5-6.) In the instant matter, the Commonwealth's CNI and franchise taxes clearly apply to all of the Taxpayer's activities conducted within the Commonwealth.

For the reasons set forth in Erieview I, judgment is entered in favor of the Commonwealth.

/s/JAMES GARDNER COLINS,
President Judge

| | | |
|---|---|---|
| ERIEVIEW CARTAGE, INC., Petitioner | : | |
| V. | : | |
| COMMONWEALTH OF PENNSYLVANIA, Respondent | : | No. 442 F.R. 1992 |

# ORDER

AND NOW, this 10th day of June, 1997, judgment in the above-captioned matter is entered in favor of the Commonwealth in the amount of $40,233:

| | Franchise Tax | Corporate Net Income Tax |
|---|---|---|
| 1986 | $4,691 | $9,121 |
| | 285 penalty | 988 penalty |
| 1987 | $4,193 | $8,330 |
| | 260 penalty | 940 penalty |
| 1988 | $3,719 | $7,149 |
| | 236 penalty | 321 penalty |

Judgment becomes final unless exceptions are filed within thirty (30) days of the entry of this order pursuant to Pa. R.A.P. 1571(i).

CERTIFIED FROM THE RECORD
AND ORDER EXIT

JUN 10 1997

/s/ Deputy Prothonotary - Chief Clerk

/s/JAMES GARDNER COLINS,
President Judge

654 A.2d 276 printed in FULL format.

ERIEVIEW CARTAGE, INC., Petitioner v. COMMONWEALTH OF PENNSYLVANIA, Respondent

No. 444 F.R. 1991, No. 445 F.R. 1991, No. 446 F.R. 1991, No. 447 F.R. 1991, No. 448 F.R. 1991, No. 449 F.R. 1991

COMMONWEALTH COURT OF PENNSYLVANIA

654 A.2d 276; 1995 Pa. Commw. LEXIS 68

December 7, 1994, Argued

February 1, 1995, Decided

February 1, 1995, FILED

PRIOR HISTORY: [**1] APPEALED From Docket Nos. 91-1843 through 91-1848. State Agency, Board of Finance and Revenue.

CORE TERMS: unitary business, miles, taxation, nexus, interstate commerce, commerce clause, dividend income, apportionable, franchise, interstate, certificate, authority to tax, doing business, taxing state, authorization, franchise tax, transportation, transportation of property, substantial justice, business activities, fairly apportioned, services provided, capital employed, state taxation, power to tax, proportionate, rationally, attributed, intrastate, unrelated

COUNSEL: Lawrence A. Salibra, II, for petitioner.

Kevin A. Moury, Deputy Attorney General, Tax Litigation Section, for respondent.

JUDGES: BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE DORIS A. SMITH, Judge, HONORABLE DAN PELLEGRINI, Judge, HONORABLE ROCHELLE S. FRIEDMAN, Judge, HONORABLE JAMES R. KELLEY, Judge, HONORABLE SANDRA SCHULTZ NEWMAN, Judge.

OPINIONBY: JAMES GARDNER COLINS

OPINION:
[*277] OPINION BY PRESIDENT JUDGE COLINS

FILED: February 1, 1995

Erieview Cartage, Inc. (Erieview) petitions for review of an order of the Board of Finance and Revenue (Board) sustaining the Department of Revenue's (Revenue) assessment of corporate net income n1 (CNI) and corporate franchise n2 taxes for the years 1983 through 1985. We affirm.

> n1 Sections 401-412 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§ 7401-7412.

> n2 Sections 601-606 of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §§ 7601-7606.

[**2]

The facts of the case are stipulated, and the

Court adopts them. Erieview is a Delaware corporation with headquarters in Ohio. During the tax years in question, Erieview engaged in interstate motor transportation of property with Interstate Commerce Commission authorization as a contract carrier with irregular routes. Erieview has no certificate of public convenience from the Pennsylvania Public Utility Commission to engage in intrastate transportation, and it has no certificate of authority from the Pennsylvania Department of State.

Erieview transports property through Pennsylvania (pass-through miles), delivers property to Pennsylvania destinations from outside the state, and picks up property in Pennsylvania for delivery out of state. In each of the tax years in question, Erieview logged approximately 2 million highway miles in Pennsylvania, constituting approximately 15 to 18 percent of its total transportation miles for each year. Erieview owns no property in Pennsylvania and has no Pennsylvania business establishment or employees. All of Erieview's transportation business is conducted using equipment leased from independent owner-operators. The leases give Erieview exclusive [**3] possession, control, and use of the equipment and complete responsibility.

In the tax years 1983 through 1985, Erieview, as a motor carrier for hire, filed and paid Pennsylvania gross receipts tax n3 based on interstate miles travelled in Pennsylvania. The gross receipts tax is an excise tax paid for the use of Commonwealth highways. 72 P.S. § 2184. Erieview did not file Pennsylvania tax returns. Based on the foregoing information, Revenue's Bureau of Examination requested that Erieview file corporate net income tax and foreign corporation franchise tax reports. Erieview paid settlement amounts due, and in

administrative reviews Erieview argued that it was not subject to the taxes. On appeal, the Board denied relief.

n3 Sections 1-9 of the Act of June 22, 1931, P.L. 694, as amended, 72 P.S. §§ 2183-2191.

Erieview now requests that this Court find the assessment of the CNI and franchise taxes unconstitutional and inconsistent with Pennsylvania law. Erieview alleges that the imposition of the taxes violates the [**4] Due Process Clause of the Fourteenth Amendment n4 and creates an impermissible burden on interstate commerce n5 .

n4 U.S. Const. amend. XIV.

n5 U. S. Const. art. I, § 8, cl. 3.

The Pennsylvania Taxes

The CNI tax applies to Erieview as a corporation doing business in the Commonwealth, [*278] carrying on activities in the Commonwealth, and having capital employed or used in the Commonwealth. 72 P.S. §7401(l)(i)-(iii). Because Erieview is a trucking company whose entire business is not transacted within the Commonwealth, the tax assessment is based on the amount of Erieview's total net business income apportionable to revenue miles within the Commonwealth.

72 P.S. § 7401(3)2.(b)(1). The franchise tax similarly applies to Erieview as a foreign entity doing business, carrying on activities, and having capital employed or

used in the Commonwealth; and the assessment is apportioned using revenue miles within the Commonwealth. 72 P.S. §§ 7601, 7602(b).

State Taxation of Interstate Commerce

Having addressed numerous [**5] cases involving due process and Commerce Clause challenges to state taxation of foreign corporations, the U.S. Supreme Court has provided the framework for our analysis. We begin by applying the tests for each of the constitutional requirements to determine whether the Commonwealth has the authority to tax Erieview at all. Allied-Signal, Inc. v. Director, Division of Taxation, __ U. S.__, *504 U.S. 768, 119 L. Ed. 2d 533, 112 S. Ct. 2251 (1992).* If we determine that the state does have the authority to tax, we then apply the unitary business principle to determine "the reach of the State's legitimate power to tax." Id. at __, *112 S. Ct. at 2258.*

The Due Process Clause requires a minimum connection between the interstate activities and the taxing state and that the income attributed to the state be rationally related to the intrastate value of the corporate business. Quill Corporation v. North Dakota, __ U.S. __, *504 U.S. 298, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992); Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 445 U.S. 425, 63 L. Ed. 2d 510, 100 S. Ct. 1223 (1980).* As noted in Quill, the minimum connection or nexus necessary for due process [**6] is based in the principles of fair play and substantial justice the court has developed in the area of judicial jurisdiction. n6 Using that standard, a state can constitutionally tax a corporation's activities when the corporation has fair warning that the activity might subject it to the state's jurisdiction. Quill, _ U.S. _, *112 S. Ct. at 1911.*

n6 See *International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945)* (traditional notions of fair play and substantial justice); *Shaffer v. Heitner, 433 U S. 186, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977); Burger King Corporation v. Rudzewicz, 471 U.S. 462, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985)* (purposeful availment of the benefits of an economic market even when the corporation has no physical presence in the state).

"In the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." Allied-Signal, _ U.S. at _, *112 S. Ct. at 2258.* [**7] In the instant case, Erieview has purposefully directed its activities at the Pennsylvania economic market, and the Pennsylvania taxes are rationally related to value Erieview receives from being able to carry on its activities in the Commonwealth. Erieview engages in the business activity of interstate transportation of property, and 15 to 20 percent of that activity (as measured in revenue miles) takes place within the Commonwealth. "The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." Quill, _U.S. at _ *112 S. Ct. at 1911.*

Commerce Clause restrictions on state taxation are currently embodied in the four-part test set forth in *Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977).* A tax will be sustained against a Commerce Clause challenge so long as the tax meets all four requirements: The "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does

not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id. at 279.* [**8]

The challenged Pennsylvania taxes meet the substantial nexus requirement. In this case, the taxed activity is transportation of property, and that activity has a substantial nexus with the Commonwealth. The nexus in this case is the same as that found in *C.I. Whitten Transfer Company v. Department of Revenue, 34 Pa. Commonwealth Ct. 37, 382 [*279] A. 2d 1251 (1978),* wherein we sustained a Commerce Clause challenge to the application of the CNI and franchise taxes to a foreign corporation engaged in interstate freight transportation. In that case, we referred to the fact that the corporation had a certificate of authority to do business in Pennsylvania in our discussion of the activity's substantial nexus with the Commonwealth, but by no means is such authorization essential to, or determinative of, the required nexus. The presence or absence of the certificate has no bearing on the volume of a corporation's business activities within the Commonwealth and its ability to take advantage of the Commonwealth's economy and services. In fact, the Commonwealth's proportionate share of Erieview's total revenue miles is greater than its share in C.T. [**9] Whitten, and C.I. Whitten had a certificate of authorization. *Id. at 43-44, 382 A. 2d at 1253-54.*

The second and third parts of the Complete Auto Transit test address the potential problem of multiple taxation. The Pennsylvania CNI and franchise taxes are fairly apportioned and do not discriminate against interstate commerce. The taxes are assessed against both domestic and foreign corporations, and the use of an apportionment formula ensures that the Commonwealth takes no

more than its fair share based on a comparison of total revenue miles and revenue miles within the Commonwealth. We came to the identical conclusions in C.I. Whitten Transfer: "The apportionment fraction used in computing Whitten's taxes assures that Whitten's interstate activities bear no more than "'a fair share of the cost of the local government whose protection its enjoys. " ' " Id. at __, *382 A. 2d at 1255 (quoting Central Greyhound Lines, Inc. of New York v. Mealey, 334 U.S. 653, 663, 92 L. Ed. 1633, 68 S. Ct. 1260 (1948)* (quoting *Freeman v. Hewit, 329 US. 249, 253, 91 L. Ed. 265, 67 S. Ct. 274 (1946))*.

That [**10] Erieview might be subject to double taxation does not necessarily mean that Pennsylvania's taxation places an undue burden on interstate commerce. The apportionment formula ensures that the Commonwealth taxes no more of the activity than is attributable to activities carried on within its borders. Assuming that each state applies its taxes only to those business activities having the required nexus, multiple taxation should be avoided. n7 In Mobil Oil Corporation, the U.S. Supreme Court rejected the corporation's argument that Vermont could not tax a portion of its dividend income because New York, its domicile, could tax all of its dividend income. Erieview cannot likewise avoid Pennsylvania taxes by raising the possibility of multiple taxation in the event that its domicile also taxes amounts apportionable to Pennsylvania. The Pennsylvania taxes are fairly related to services provided by the Commonwealth. Erieview benefits directly and indirectly from the Commonwealth's protection, opportunities, and services. Notably, Erieview avails itself of access to the Commonwealth's economic market and enjoys the benefits and protections of its courts, laws, and law enforcement. Erieview [**11]

uses the Commonwealth's roadways and bridges and shares in the benefits of its roadway maintenance and safety services.

> n7 Although there is no clear holding on the issue, prominent commentators have suggested that income derived from interstate activities may be taxed in full by the domiciliary state and on an apportioned basis by nondomiciliary states in which the activities are conducted without offending the commerce clause. David R Shores, State Taxation of Interstate Commerce: Quill, Allied Signal and a Proposal, 72 *Neb. L. Rev. 682, 717n.150 (1993).*
>
> Having determined that Pennsylvania may constitutionally tax Erieview as a foreign corporation doing business and employing capital in the Commonwealth, we now turn to the unitary business principle to ascertain the scope of that power to tax. n8 [**12]

[*280] The unitary business rule is a recognition of two imperatives: the States' wide authority to devise formulae for an accurate assessment of a corporation's intrastate value or income; and the necessary limit on the States' authority to tax value or income which cannot in fairness be attributed to the taxpayer's activities within the State.

Allied-Signal, __ U.S. at __ *112 S. Ct. at 2259.* The unitary business principle permits a state to tax its proportionate share of the value of the unitary multistate business operation. The same principles that permit a state to tax a foreign corporation's instate capital stock by reference to its unitary business also allow proportional valuation of a unitary business in enterprises of other sorts. Id. at __, *112*

*S. Ct. at 2258-59.* The principle has long applied to franchise and income taxes as well as to property taxes. Id.; see, e.g., *Underwood Typewriter Co. v. Chamberlain, 254 US. 113, 65 L. Ed. 165, 41 S. Ct. 45 (1920)* (income tax).

> n8 The unitary business principle is invoked most often in cases where the taxing state attempts to reach income obtained from sources unrelated to the unitary business activity; for example, dividend income, which arises from investment activity, would not be apportionable if the dividend payor's activities are unrelated to the corporation's activities in the taxing state. See e.g., Mobil Oil Corporation (dividend income apportionable as unitary business income); *ASARCO Incorporated v. Idaho State Tax Commission, 458 U.S. 307, 73 L. Ed. 2d 787, 102 S. Ct. 3103 (1982)* and F W *Woolworth Co. v. Taxation & Revenue Department, 458 US. 354, 102 S. Ct. 3128, 73 L. Ed. 2d 819, 50 U S.L. W. 4957* (1982) (dividend income not apportionable because not part of unitary business income).

Accordingly, Erieview is subject to the Commonwealth's CNI and franchise taxes, which have been constitutionally applied [**13] in accordance with the requirements of Due Process and Commerce Clauses.

JAMES GARDNER COLINS, President Judge

ORDER

AND NOW, this lst day of February, 1995, judgment in the above-captioned matter is entered in favor of the Commonwealth in the amount of $ 79,769:

| | Franchise Tax | Corporate Net Income Tax |
|---|---|---|
| 1983 | $3,977 | $20,252 |
| 1984 | $7,320 | $20,450 |
| 1985 | $7,320 | $20,450 |

Judgment becomes final unless exceptions are filed within thirty (30) days of the entry of this order pursuant to Pa. R.A.P. 1571(i).

JAMES GARDNER COLINS, President Judge